SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term 1974

No. 74-990

UNITED STATES OF AMERICA, ex rel. HAROLD MUNGER, GERALD HARTLEY and SAINT JULIAN HARRISON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

UNITED STATES OF AMERICA, ex rel. HAROLD MUNGER, GERALD HARTLEY and SAINT JULIAN HARRISON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a Writ of Certiorari to the United States Court of Appeals which affirmed the order of the United States District Court for the Southern District denying petitioners' petition for a Writ of Habeas Corpus and for a Certificate of Probable Cause.

THE OPINION BELOW

The decision of the United States Court of Appeals is dated January 9th, 1975, and did not contain an opinion. A copy of the decision is annexed hereto as Appendix B.

The decision and opinion of the United States District Court, Southern District, dated December 18th, 1973, is annexed hereto as Appendix A.

THE GROUNDS OF JURISDICTION

The order sought to be reviewed was dated and entered on January 9th, 1975.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment to the Federal Constitution protect every person against incrimination by the use of evidence obtained through illegal wiretapping?

2. Can a conviction be supported by evidence obtained in violation of the constitutional rights of people?

3. May the erroneous admission of illegally obtained evidence be used to support a conviction?

4. Does the essence of a provision forbidding the acquisition of evidence in a certain way permit the evidence so acquired to be used at all?

5. Must a judgment of the Court of Appeals affirming a denial of a Writ of Habeas Corpus and a Certificate of Probable Cause be reversed where a conviction of crime was obtained through the use of illegally obtained evidence?

6. May a State conviction of crime be sustained where illegally obtained evidence obtained through illegal wiretaps was erroneously admitted at the trial?

7. May a conviction stand where illegally obtained evidence was admitted in evidence where the conviction in large part depended upon the jury's resolution of the credibility of witnesses and the determination must almost certainly have been influenced by the incriminatory nature of the physical evidence erroneously admitted and there is at least a reasonable

possibility that the evidence complained of might have contributed to the conviction?

8. May a judgment of conviction stand where at a trial of possession of narcotics and bribery, both charges of which were tried together before the same jury, evidence which was declared by the Trial Court and the Appellate Court as illegally obtained and tainted, be erroneously admitted at this trial and support a conviction for bribery, where there is no way to tell how much the jury was influenced by the admission of the erroneously and illegally obtained evidence?

9. May a general verdict, upon several issues, stand, where erroneously, evidence was admitted which was obtained illegally and declared by the courts to be tainted, and where the courts declared that the charge of possession of narcotics must be vacated because of the tainted evidence, and where the State courts below permitted the verdict as to another issue, bribery, to stand, even though the same evidence was presented to the same jury at the same time?

10. May a State Appellate Court in utter disregard of their State statute, assume jurisdiction which the statute prohibits and thus deny to the petitioners due process and equal protection of the laws?

11. May a State Appellate Court, in utter disregard of their State statute, assume jurisdiction which the State statute prohibits and reverse a decision of a State judge who granted a new trial, which is a discretionary act, and is not appealable, in violation of the petitioners' rights to due process and equal protection of the laws?

12. May a State Appellate Court disregard their State statute and reinstate a conviction for bribery which had been set aside and a new trial ordered because of the erroneous admission of illegally obtained evidence at a joint trial of several issues before the same jury at the same time?

STATEMENT OF THE CASE

The petitioners herein had originally been convicted of the crimes of felonious possession of narcotics (former New York Penal Law, §1751, Subds. 2, 3) and bribery (*id.*, §378), after trial before Justice Marks and a jury in the Supreme Court, Bronx County, on the 5th day of March, 1968.

Subsequent to the conviction, namely on December 17th, 1969, Justice Marks vacated the judgments of conviction and directed a new trial because of the fact that illegally obtained evidence had been used during the joint trial of the narcotics and bribery charges before the same jury.

It should be noted, however, that between the judgment of conviction and the vacating of the judgment of conviction, the Appellate Division of the Supreme Court had affirmed the judgment of conviction [30 App. Div. 2d 776 (1968)], as did the Court of Appeals, while affirming, had directed a wiretap hearing pursuant to *Alderman v. United States*, 394 U.S. 165.

It was as a result of that wiretap hearing that the *nisi prius* judge had concluded that tainted evidence was used in connection with the trial of the appellants and ordered a new trial on all charges.

The People then appealed to the Appellate Division of the Supreme Court on the grounds that without the use of the suppressed evidence, they could not proceed with the case against the petitioners at all (§518(6), N.Y. Code of Crim. Proc.).

The Appellate Division, however, exceeded its jurisdiction and violated the due process rights of the petitioners when they modified, on November 23rd, 1971, the order of Justice Marks, by affirming with respect to the narcotics charge, but denying a new trial with respect to the bribery charges, and reinstated those convictions.

The Court of Appeals, on or about July 2nd, 1973, dismissed unanimously without opinion, on procedural grounds.

The petitioners each received a five to ten year sentence on the judgment of conviction for bribery which they are presently serving.

The petitioners have already served over forty months of this sentence.

The petitioners filed an order to show cause why a Writ of Habeas Corpus should not be issued in the United States District Court, Southern District of New York, which was denied by MacMahon, District Judge, who also denied a Certificate of Probable Cause.

The United States Court of Appeals affirmed, no opinion.

REASONS FOR GRANTING THE WRIT

I.

The Court below erred when it found that the petitioners had failed to raise the claims on the question of taint from illegal wiretapping on the bribery conviction and that the jury's hearing of illegal evidence with regard to the narcotics prejudiced its decision on the bribery charge in the State courts.

It is well settled that under the laws of the State of New York, the Court of Appeals can only consider these issues that were properly presented to the Trial Court. *Code of Criminal Procedure*, §520(1). If Judge MacMahon were correct the issues raised here would never have been considered by the New York Court of Appeals, but the opinion of that Court dealth with these issues.

Judge Keating in his opinion in *People v. Munger, supra*, 24 N.Y. 2d at 448 wrote:

> "Prior to trial, appellants moved for separate trials on the bribery charge . . . and narcotics charge . . . ."

Moreover, this opinion of the New York Court of Appeals was rendered prior to the order of Justice Marks which ruled that the wiretaps were illegal and all evidence derived therefrom would be inadmissible. Thus, it is clear that the Trial Jury, at a new trial on the bribery charges, would not hear any testimony as to the narcotics for while it may be relevant it was illegally

seized. In *Silverthorne Lumber Co., Inc. v. United States,* 251 U.S. 385, 392 (1920), Mr. Justice Holmes wrote:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

Judge Keating in his opinion noted that upon learning of the wiretap, the petitioners moved for a full evidentiary hearing, which was denied by the Trial Judge based on the representation by the District Attorney that no evidence or leads was derived from them. Judge Keating, obviously very much aware of the petitioners' claim that the wiretapping tainted both the narcotics and the bribery conviction when he wrote:

> "If it should be determined that a portion of the evidence with respect to the narcotics activities is tainted, then it will have to be determined what effect this would have on the bribery charge." *(People v. Munger,* 24 N.Y. 2d at 453.)

Thus the record from the State Court clearly indicates that the petitioners had raised the question of taint and improper joinder of the narcotics and bribery counts, from the very beginning of the case.

It is crystal clear from the record, that the Court of Appeals recognized that both issues had been raised in the record, when Judge Keating, in his opinion, stated "Prior to trial, appellants

moved for separate trials on the bribery charge, and the narcotics charge," and then further, in his opinion stated:

> "If it should be determined a portion of the evidence with respect to the narcotics activities is tainted, then it will have to be determined, what effect this would have on the bribery charge." *(People v. Munger,* 24 N.Y. 2d at 453.)

In addition to the above, when this case went to the Court of Appeals for the second time, on pages 22-24 of the appellants' brief we again specifically raised the question of the effect of the illegally obtained evidence on the verdict herewith.

We quote from pages 22-24 as follows:

> "The remand by the Court of Appeals was clear and unequivocable.
>
> Judge Keating (A17) said:
>
> 'While it would appear that the bribery conviction is, by the very nature of the crime, based upon independent evidence, we cannot be certain of this on the present state of the record. The motivation for the bribery was appellants' criminal involvement with narcotics. If it should be determined that a portion of the evidence with respect to the narcotics activities is tainted, then it will have to be determined what effect this would have on the bribery charge . . . . If the order is determined to be illegal, there will then

have to be a determination whether the convictions are based upon tainted evidence, and, if so, whether a new trial must be ordered.'

It is perfectly obvious that the majority of the Appellate Division failed to understand the concern of the Court of Appeals, when it ordered a remand.

The question in the mind of the Court of Appeals was whether the taps, if illegal, had led to information which was improperly used at the trial, and if so to what effect the improper use of the tainted evidence had on the bribery conviction.

Mr. Justice Marks decided that the evidence as to the narcotic activities was so tainted, it was impossible to come to any other conclusion but that the improper use of this tainted evidence affected the bribery conviction.

The majority of the Appellate Division decided that the evidence as to the narcotic activities was so tainted they affirmed Judge Mark's decision as to the taint and they suggested that the defendants-appellants move to dismiss the narcotic counts in the indictment. But, the majority of the Appellate Division failed to determine what effect the improper use of this tainted evidence had on the bribery conviction,

which was the very question the Court of Appeals wanted answered.

The Appellate Division had no authority to disregard the opinion of the Court of Appeals and to substitute therefor its own theory, which was inconsistent with the opinion of the Court of Appeals.

The Court of Appeals ruled on the law and the facts of this case and remanded so that the question as to what effect, if any, the tainted evidence had on the bribery conviction might be determined. The Appellate Division, however, went off on a tangent and set aside the granting of a new trial in the bribery conviction by ruling that the bribery was an independent crime.

This begs the question.

The Court of Appeals knew when the case was before it that bribery is an independent crime, and didn't have to order a hearing to determine that rule of law."

The question of whether or not the taint affected the bribery conviction was thus again argued in the State Court of Appeals.

II.

The Court below erred in finding that the petitioners contend that no hearing was held on the question of taint regarding the bribery conviction.

The Trial Court, on remand, held a nine-week hearing on the question of taint and then held that the taint vitiated both convictions and ordered a new trial on both charges.

How many times must a taint hearing be held and asked for?

The Trial Court and the Appellate Division both held that the record before the jury showed that illegal testimony was presented to the jury.

III.

This appeal by the People was made under §518 of the Code of Criminal Procedure, providing for those matters which may be appealed by the People. Amongst the provisions of this section is one allowing an appeal by the People where a decision adverse to the People on suppression is made, providing the District Attorney files a statement required by §518-a of the Code of Criminal Procedure. The District Attorney filed such a statement.

The authority of this Court is restricted in such cases to either affirm, reverse or otherwise modify the adverse suppression order. To go beyond this exceeds the authority of the Court, as the Court may not assume authority not authorized by statute.

Mr. Justice Marks in his decision, granting suppression of the evidence, ordered a new trial. Since this is a discretionary order, it is not reviewable on appeal. There is no authorization by statute, or otherwise, permitting the People to appeal from an order granting a new trial.

If the People felt aggrieved by the order of Mr. Justice Marks mandating a new trial, the proper remedy as provided for by law is for the People to procure a writ of prohibition. The People failed to do this.

It is respectfully submitted that this Court exceeded its authority when it ordered that Mr. Justice Marks' order, granting a new trial, should be reversed insofar as the bribery charge is concerned, and ordered the reinstatement of the original conviction thereunder, since such a determination was not properly before the Court on this appeal.

Inasmuch as this Court had no other authority in this appeal but to affirm, reverse or otherwise modify the suppression order appealed from; inasmuch as Mr. Justice Marks' order granting a new trial to the defendants-respondents was a discretionary order and not reviewable on appeal; and inasmuch as there is no appeal permitted to the People from an order granting a new trial, it is respectfully submitted that the order of this Court which it had no authority to make is in violation of the constitutional rights of the defendants-respondents as guaranteed by the Constitution of the United States to due process and equal protection of the law.

The appellate jurisdiction of the courts of New York in criminal cases is purely statutory, and such jurisdiction can

never be assumed unless a statute can be found which expressly sanctions its exercise. *Code Cr. Proc.*, §§515-517. *People v. Gersewitz*, 294 N.Y. 163.

An order granting a new trial is a discretionary order and accordingly not reviewable. *Los Angeles Inv. Sec. Corp. v. Joslyn*, 282 N.Y. 438; *Chermuchin v. Barkin, Inc.*, 243 N.Y. 602; *Gaines v. Fidelity & Casualty Co.*, 188 N.Y. 411, 415.

As under this section (518) the people have no right of appeal from an order granting a new trial in a criminal case. *People ex rel. Jerome v. Court of General Sessions*, 112 A.D. 424, 98 N.Y.S. 557; *People v. Beckwith*, 3 N.Y. St. R. 759.

Section 7801, *C.P.L.R.* Prohibition is the appropriate remedy, since the People cannot, under this section (518) appeal. *People v. Court of General Sessions*, 185 N.Y. 504.

As under this section (518) the people have no right of appeal from an order granting a new trial in a criminal case, the writ of prohibition was the proper procedure where the court in a criminal case improperly granted a motion for a new trial made after judgment. *People ex rel. Jerome v. Court of General Sessions, supra.*

The Court below erred in finding that this was simply a State question, inasmuch as the State Appellate Court assumed authority it did not have; it denied due process and equal protection of the law to the petitioners.

RELEVANT STATUTE

§518. In what cases appeal may be taken by the people

An appeal may be taken by the people as of right in the following cases to the court to which an appeal would lie in the same action or proceeding from a judgment of conviction other than of death, as provided in section five hundred seventeen;

1. From a judgment for the defendant, on a demurrer to the indictment;

2. From an order of the court, arresting the judgment;

3. From an order of the court, made at any stage of the action, setting aside or dismissing the indictment on a ground other than the insufficiency of the evidence adduced at the trial;

4. From an order granting a motion to vacate a judgment of conviction, otherwise known as a motion or application for a writ of error coram nobis;

5. In all cases where an appeal may be taken by the defendant, except where a verdict or judgment of not guilty has been rendered;

6. From an order of a court entered prior to trial granting a motion for the return of property or suppression of evidence, made pursuant to section eight hundred thirteen-c, or for the suppression of a confession or admission made pursuant to section eight hundred thirteen-g, or for the suppression of

eavesdropping evidence made pursuant to section eight hundred thirteen-l, provided that the people file in the appropriate court a statement in accordance with the provisions of section five hundred eighteen-a.

As amended L. 1962, c. 954, §2; L. 1965, c. 846, §2; L. 1969, c. 1147, §3.

Subd. 6 added L. 1962, c. 954, §2, eff. April 29, 1962; amended L. 1965, c. 846, §2 eff. July 16, 1965; L. 1969, c. 1147, §3, eff. on 30th day after May 26, 1969. L. 1965 inserted reference to section 813-g. L. 1969 inserted reference to §813-l.

§518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or suppression of a confession or admission or for the suppression of eavesdropping evidence pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, or of the eavesdropping evidence ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, (1) insufficient as a matter of law, or (2) so weak in its entirety that

any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission, or eavesdropping evidence in question, unless and until the order of return or suppression is reversed on appeal and vacated.

Added L. 1962, c. 954, §3; amended L. 1965, c. 846, §3; L. 1969, c. 1147, §4.

IV.

A judgment of conviction cannot stand where tainted evidence was presented to the same jury at the same time at a joint trial of several issues.

The Appellate Division disregarded or misread the opinion of the Court of Appeals which mandated that a hearing be held to determine whether the convictions were based on tainted evidence, and if so, whether a new trial must be ordered.

The Appellate Division agreed with Justice Marks that the evidence, with respect to the narcotics activities was tainted, but disregarded the mandate of the Court of Appeals to determine if the tainted evidence affected the conviction for bribery, but

ruled instead, that a subsequent bribery of a police officer was not effected by a finding that the evidence concerning narcotics was tainted.

The Appellate Division did not realize that the evidence upon which the convictions for bribery rested was necessarily also tainted, because there was a joint trial with the narcotics charge, before the same jury.

It is respectively submitted, that there could be no conviction on bribery so long as a determination of the virulence of the illegally admitted evidence remain unknown.

It cannot be said, we submit, beyond a reasonable doubt, that there was no prejudice as a result of a joint trial. (*Chapman v. California*, 365 U.S. 610.)

The decision of the Appellate Division, however, that the bribery conviction could stand, irrespective of the fact, that the narcotics charges, could not, because of tainted evidence, is self defeating, since the *same* evidence, upon which the jury convicted in the bribery charges, was presented in the trial of the narcotics charges, because they were tried simultaneously before the same jury.

We cannot over-emphasize the importance of the issue permeating this case, which really transcends virtually all of the other issues. This is, of course, the fact that after the Trial Judge had ordered a new trial, on both the bribery and narcotics charges, the Appellate Division reinstated the bribery conviction, despite the fact that the same tainted evidence was

heard by the same jury because the narcotics case was held to be improperly tried under any circumstances.

The Appellate Division, by sustaining the Trial Court as to the narcotics conviction and agreeing that tainted evidence had been used at the trial, could not then reinstate a conviction based upon that very evidence since it is impossible to determine by the general verdict of the jury, what evidence they believed or disbelieved. (*Jackson v. Denno*, 378 U.S. 368.)

It is respectfully submitted, that under the circumstances, the constitutional rights of the petitioners herein, were clearly violated, as they are incarcerated for over 40 months as a result of evidence which is tainted.

It is sheer speculation, as to what the Trial Jury would have done, if the illegally obtained contraband, had not been placed in evidence before it, for clearly, without the illegally seized material, there would have been a sharp issue of credibility. A jury, hearing only the legally obtained evidence, might well have exercised its "power to bring in a verdict of acquittal in the teeth of both law and facts." (*Hornung v. Dist. of Columbia*, 254 U.S. 135, 138.)

The judges of the Appellate Division had not seen nor heard the witnesses, but they had been exposed, as had the Trial Jury, to the illegally obtained contraband.

Chief Justice Hughes stated in *Morgan v. United States*, 298 U.S. 468, 481, "The one who decides must hear."

The Second Circuit in *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 470, held:

> "Once the Appellate Division had determined that the Jury had been exposed to illegally admitted evidence, due process required that the petitioners be accorded a new trial."

Where incompetent evidence is admitted against the defendant's exception which bore upon one of the principal issues on trial, and which tend to prejudice the jury against the defendant, and it cannot be known how much the jury was influenced by it, its admission requires that the judgment be reversed. *Columbia & P.S.R. Co. v. Hawthrone*, 144 U.S. 202, 12 S. Ct. 59', 36 L. Ed. 405.

If upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, a general verdict upon several issues cannot be upheld. Maryland use of *Markely v. Baldwin*, 112 U.S. 490, 52 S. Ct. 278, 28 L. Ed. 822.

The government cannot violate the constitutional right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures and use the fruits of such unlawful conduct to secure a conviction and cannot make indirect use of such evidence for its case and a conviction cannot be supported by evidence obtained in violation of such constitutional right. *United States Constitution*, Fourth Amendment; *Walder v. United States*, 74 S. Ct. 354, 347 U.S. 62, 98 L. Ed. 503.

In *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, Mr. Justice Clark wrote at p. 1085:

> "In this jealous regard for maintaining the integrity of individual rights, the court gave life to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'" *I, Annals of Cong.* 439 (1789).

Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional" (at p. 638).

The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their houses, papers and effects, against unreasonable searches and seizures . . . ." Under this, evidence obtained in violation of the Fourth Amendment can not be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). This prohibition applies as well to the fruits of the illegally seized evidence. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

In *Fahy v. Connecticut*, 375 U.S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229, the opinion of the court was written by Chief Justice Warren. On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained

by an illegal search and seizure can ever be subject to the normal rules of "harmless error" under the federal standards of what constitutes harmless error. Compare *Ker v. California,* 374 U.S. 23. We find that the erroneous admission of this constitutionally obtained evidence at this petitioners' trial was prejudicial; therefore the error was not harmless and the conviction must be reversed.

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. As the Court has noted in the past: "The essence of a provision for bidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." Thus the petitioner should have had a chance to show that his conviction was induced by being confronted with illegally seized evidence. Nor can we ignore the cumulative prejudicial effect of this evidence upon the conduct of the defense at trial.

A judgment of a Court of Appeals affirming a conviction of crime must be reversed where evidence obtained through an unlawful search was admitted at the trial. *Chapman v. United States,* 365 U.S. 610, 81 S. Ct. 776, 5 L.Ed. 2d 828.

A State conviction of crime must be reversed where unconstitutionally obtained evidence, prejudicial to the defendant was erroneously admitted at his trial. *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L.Ed. 2d 171.

A conviction of crime must be reversed where evidence obtained through an unreasonable search was admitted at the trial. *Stoner v. California,* 376 U.S. 483, 84 S. Ct. 889, 11 L.Ed. 2d 856.

The admission in a criminal trial of evidence obtained by an unlawful search is not harmless error where the conviction depended in large part upon the jury's resolution of the question of credibility of witnesses, and that determination must almost certainly have been influenced by the incriminating nature of the physical evidence illegally seized and erroneously admitted, there being at least a reasonable possibility that the evidence complained of might have contributed to the conviction. *Stoner v. California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856.

In this case, the Appellate Division had determined that the jury had been exposed to the illegally seized contraband, and therefor, due process requires that the petitioners be accorded a new trial on their bribery conviction.

The federal government has the obligation of assuring that "Fundamental fairness is accorded to all citizens." *(Ker v. California,* 374 U.S. 23.)

CONCLUSION

The petition for a Writ of Certiorari should be granted.

WHEREFORE, petitioners pray that a Writ of Certiorari may issue directed to the United States Court of Appeals for the Second Circuit, commanding the said Court to certify to this Court, pursuant to the usual practice, a transcript of the record herein and of the proceedings upon it, pursuant to which the decree denying the Writ of Habeas Corpus herein was issued, so that the said proceeding may be reviewed in this Court and the decree by which petitioners deem themselves aggrieved may be reversed.

Respectfully submitted,

s/ Herbert S. Siegal
Attorney for Petitioners

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 9TH, 1975

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of January, one thousand nine hundred and seventy-five.

United States of America ex rel. Harold Munger, Gerald Hartley and Saint Julian Harrison,

Petitioners,

v.

The People of the State of New York,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioners dated November 25, 1974 for a certificate of probable cause or to summarily reverse be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge.

WILFRED FEINBERG,
WALTER R. MANSFIELD,
Circuit Judges

APPENDIX B

DECISION AND OPINION OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 18TH, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. HAROLD MUNGER, GERALD HARTLEY and SAINT JULIAN HARRISON,

Petitioners,

- v -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

73 Civ. 3253-LFM

MacMAHON, District Judge.

Petitioners, Harold Munger, Gerald Hartley and Saint Julian Harrison, collaterally challenge, under 28 U.S.C. § 2254, their convictions for bribery, imposed by the Supreme Court, Bronx County, on March 5, 1968 after a jury trial. Petitioners were also convicted on that date of felonious possession of narcotics. The judgments of conviction were affirmed by the

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Appellate Division, First Department. *People v. Munger*, 30 App. Div.2d 776 (1968). The New York Court of Appeals also affirmed but remanded to the trial court for a hearing to determine whether the convictions were tainted by use of illegal wiretap evidence. 24 N.Y.2d 445 (1969). After a hearing, Justice Marks found taint as to both convictions and granted a new trial on December 17, 1969. On November 23, 1971, the Appellate Division affirmed Justice Marks' order as to the narcotics conviction but reversed as to the bribery conviction, which it reinstated. 37 App. Div.2d 950 (1971). An appeal to the New York Court of Appeals was dismissed on July 2, 1973.

Petitioners allege the following violations of their rights: (1) the prosecution failed to prove, beyond a reasonable doubt, that the illegal wiretaps were not used in the bribery prosecution; (2) certain tapes indicating petitioners were not guilty of bribery were concealed from the defense at trial; (3) other tapes were erased, thus interfering with their defense and attempt to prove taint of the bribery conviction; (4) no hearing was held on the question of taint regarding the bribery conviction; (5) the jury's hearing of illegal evidence with regard to the narcotics charge prejudiced its decision on the bribery charge and (6) the Appellate Division had no jurisdiction to render the decision it made.

Petitioners have never raised claims (4) or (5) in the New York courts and have failed to demonstrate here that their state remedies have been exhausted as to those claims. The United States Supreme Court has held, in *Picard v. Connor*, 404 U.S. 270 (1971), that "the substance of a federal habeas claim must

first be presented to the state courts."[1] Since petitioners have not presented claims (4) and (5) to the New York courts, we may not consider them here.[2]

It appears that during the summer of 1966, petitioners were the subjects of an investigation by detectives of the New York City Narcotics Bureau and federal agents. On August 17, 1966, Lee Cox, petitioner Hartley's wife, carrying a blue cosmetics bag, visited her mother, who lived at 30 Fleet Walk in Brooklyn. The following day, August 18, detectives of the Narcotics Bureau, acting pursuant to a warrant grounded partly on information obtained by use of an illegal wiretap, seized the cosmetics bag, which contained $9,000 and two guns, at the Fleet Walk address. The same day, Detective Sgt. Ward and other detectives, accompanied by federal agents, took the cosmetics bag to 2332 Tiebout Avenue in the Bronx, where Lee Cox lived. Gerald Hartley was in the apartment when the officers arrived, and he immediately identified the cosmetics bag and its contents as his, saying: "I gave them to my wife and told her to bring it to Brooklyn and stash it in her mother's house." Petitioner Harrison then arrived at the apartment, and when Hartley told him, "I think I'm in some kind of trouble," Harrison asked the officers, "could this be straightened out for money?" Harrison also told the officers that he was aware that city and federal agents had been following him.

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1. *Picard v. Connor*, 404 U.S. 270, 278 (1971); 28 U.S.C. § 2254 (b).

2. *United States ex rel. Nelson v. Zelker*, 465 F.2d 1121, 1124-25 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972); *United States ex rel. Rogers v. LaVallee*, 463 F.2d 185 (2d Cir. 1972).

Appendix B

After a private conversation with Hartley, Harrison offered to pay the officers $100,000. The detectives met with Hartley, Harrison and Munger at midnight that evening, and it was agreed that the bribe money would be forthcoming in two to three weeks. The police informed Munger that they had considerable information concerning him, and he replied that he wanted the information. Petitioners were arrested in the early morning hours of September 1, 1966, at which time Munger delivered to the detectives a black hat box containing $20,147.

Petitioners claim that the Appellate Division, in reinstating the bribery conviction, failed to apply the correct standard in evaluating taint, *i.e.*, that the burden is on the state to prove freedom from taint beyond a reasonable doubt.[3] We feel the following passage from the Appellate Division's opinion demonstrates that it applied the proper standard:

> "We find no support in the record for the [trial] court's finding as to the bribery convictions. On the contrary, the record clearly shows that the bribe offer was an independent and voluntary act. As such, it was attenuated so as to be purged of any taint . . . . The concededly illegal search and seizure did not taint the subsequent bribe offer . . . . The bribe was not induced by the wiretapping. It was an unrelated crime unaffected and untainted by any overheard conversation.

3. *Alderman v. United States*, 394 U.S. 165 (1969).

The bribery convictions should not be disturbed."[4]

Although the Appellate Division did not make a *specific* finding of freedom from taint "beyond a reasonable doubt," its finding that the bribery convictions were "purged of any taint" is equivalent to, or surpasses, such a finding. We find the Appellate Division applied the proper standard.[5]

Petitioners argue that the bribery would not have occurred without prior unlawful conduct by the state and that, therefore, the bribery conviction is tainted. Specifically, they allege that illegal wiretaps led to the seizure by police of the blue cosmetics bag belonging to Gerald Hartley and that, absent that seizure, no attempt to bribe the detectives would have occurred.[6] Even if we were to accept petitioners' reading of the facts, this argument fails. In cases involving 18 U.S.C. § 201, the federal bribery

4. 37 App. Div.2d at 950. Justice McGivern, concuring, said: "I find nothing to sustain an inference that the bribery was supported by other than independent evidence and accordingly that portion of the order should be reversed." 37 App. Div.2d at 950. Justice Stevens dissented and would have affirmed the trial court.

5. Petitioners rely heavily on the district attorney's certification that the state could not proceed with the bribery or narcotics prosecutions unless the evidence suppressed by the trial court could be used. Such a certification is a prerequisite to appeal of a suppression order. N.Y. Criminal Procedure Law § 450.50 (a) (McKinney 1971). The certification did not constitute an admission by the state that no evidence free from taint was available to the prosecution. It merely stated that since Justice Marks' order held that all prosecution leads to evidence were tainted by illegal wiretaps, no evidence remained on which the state could proceed.

6. We note that the Appellate Division found the wiretaps "did not taint the subsequent bribe offer." 37 App. Div.2d at 950.

statute, it has been held that the fact that illegal conduct by the government presented a defendant with an opportunity to commit bribery does not affect the validity of a bribery conviction.[7] Therefore, we reject petitioners' argument.

Petitioners claim that the prosecution improperly concealed from them a tape containing evidence indicating their innocence of the bribery charges. We have reviewed a transcript of the concealed tape, which contains a conversation between Sgt. Ward and his superior, Lt. Esko, on August 18, 1966. The call was placed by Ward from the Tiebout Avenue apartment shortly after Harrison indicated his intention to bribe the detectives. Our review of the transcript reveals no admission by the officers, as petitioners claim, that the defendants could not be arrested for bribery. Rather, the discussion focused on defendant Harrison's motivation in seeking to bribe the officers and on the detectives' subsequent strategy. We conclude that petitioners have failed to make a factual showing of prejudice due to the prosecution's failure to provide the defense with this tape.

Petitioners also claim that the erasure of certain tapes[8] by the police in 1966 prejudiced their defense to the bribery charge upon the trial and also their attempt upon the hearing held on remand to prove that the bribery conviction was tainted by

7. *Vinyard v. United States*, 335 F.2d 176 (8th Cir.), *cert. denied*, 379 U.S. 930 (1964); *United States v. Troop*, 235 F.2d 123 (7th Cir. 1956); Cf. *United States v. Perdiz*, 256 F. Supp. 805 (S.D.N.Y. 1966).

8. Apparently, the New York City Police Department ordered the tapes erased as an economy measure. Erasure may also have occurred due to a malfunction in the equipment used by the officers.

illegal wiretaps. Citing *United States v. Huss*, 482 F.2d 38 (2d Cir. 1973), they contend that the prosecution must provide them either with the tapes or verbatim transcripts.

The instant case, however, is very different from *Huss*. There, federal agents destroyed the tapes in violation of the warehousing provisions of 18 U.S.C. § 2518 (8) (a), which require preservation of tapes for a period of ten years.[9] Here, however, the police officers were not required to retain the tapes at the time of the erasure either by federal or New York law. Furthermore, *Huss*, involved extraordinary circumstances not duplicated here.

In *Huss*, a witness who was held in contempt of court for refusing to testify in a criminal case claimed that the government had learned of his identity through an illegal wiretap and that, therefore, he could not be compelled to testify. The Court of Appeals found that summaries of the destroyed tapes, furnished by the government, were inadequate to enable the defendant to carry his burden of proof at an *Alderman* taint hearing,[10] since only the tapes or verbatim transcripts would enable the defendant to determine whether the government had in fact learned of his identity via an illegal wiretap. No such situation is presented here.

Petitioners, here, do not contest the accuracy or completeness of the summaries of the tapes provided by the

9. *United States v. Huss*, 482 F.2d 38, 48 (2d Cir. 1973).

10. *United States v. Huss*, *supra*, 482 F.2d at 51.

prosecution, and the summaries show that bribery was not mentioned by anyone in any of the recorded conversations. Thus, the summaries were adequate to enable petitioners to sustain their burden of proof. We find, therefore, that neither petitioners' defense to the bribery prosecution nor their post-trial attempt to prove taint of the bribery conviction was prejudiced by erasure of the tapes since the erased tapes contained no information relevant to the bribery charge.

Finally, petitioners claim that the Appellate Division had no jurisdiction to reinstate the bribery conviction. This contention presents merely a question of state law. It does not amount to a claim that petitioners are "in custody in violation of the Constitution or treaties of the United States" 28 U.S.C. § 2254 (a). We, therefore, do not consider petitioners' jurisdictional argument.

Accordingly, the within application is denied in all respects. A certificate of probable cause (28 U.S.C. § 2253) will not issue since there are no questions of substance on which the Court of Appeals should rule.

So ordered.

Dated: New York, N. Y.

December 18, 1973

s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-990

HAROLD MUNGER, GERALD HARTLEY, and SAINT JULIAN HARRISON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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HAROLD MUNGER, GERALD HARTLEY, and SAINT JULIAN HARRISON,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, dated January 9, 1975, which denied petitioners' application for a certificate of probable cause. Petitioners sought to appeal from an order of the United States District Court for the Southern District of New York, dated December 18, 1973, which denied their application for a writ of habeas corpus.

Opinions Below

The Second Circuit denied petitioners' application for a certificate of probable cause without opinion. The order is unreported and is reproduced as Appendix "A" to the

petition. The opinion of the District Court denying the application for a writ of habeas corpus is unreported and is reproduced as Appendix "B" to the petition.

Jurisdiction

The order of the Court of Appeals was entered on January 9, 1975. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

1. Have petitioners presented any factor which would motivate the exercise of this Court's certiorari jurisdiction?

Statement of the Case

A. State Proceedings

Petitioners were convicted of the crimes of felonious possession of narcotics and bribery on March 5, 1968, in the Supreme Court, Bronx County (MARKS, J.), after a trial by jury. The judgments of conviction were affirmed by the Appellate Division, First Department. *People* v. *Munger*, 30 A D 2d 776 (1968). The New York Court of Appeals modified the judgments, ordering a remand to the trial court for a suppression hearing to determine if certain wiretaps were conducted illegally and if so, whether the illegal evidence tainted the convictions. 24 N Y 2d 445, *mot. to amend the remittur den.* 24 N Y 1026 (1969).

On December 17, 1969, after a suppression hearing, the trial court found that the wiretap evidence was illegally obtained and had tainted both convictions. Justice Marks ordered a new trial. On November 23, 1971, the Appellate Division modified the order by reversing the trial court insofar as it had ordered a new trial on the bribery charges.

The Court held that the record clearly showed that the bribery offer was an independent and voluntary act, untainted by the illegally seized evidence. Accordingly, the bribery convictions were reinstated. 37 A D 2d 950 (1st Dept. 1971). Cross appeals to the New York Court of Appeals were dismissed in July, 1973. Petitioners stand convicted of bribery, and each is serving a sentence of five to ten years.* The narcotics charges were dismissed on April 17, 1974.

B. Federal Proceedings

Petitioners then brought their federal habeas corpus petition in the District Court.** They alleged that:

1. The prosecution failed to prove beyond a reasonable doubt that the illegal wiretaps were not used in the bribery prosecution;

2. Certain tapes were destroyed;

3. Certain allegedly exculpatory tapes were concealed from the defense at trial;

4. No hearing was held on the question of taint regarding the bribery conviction;

5. The jury's hearing illegal evidence with respect to the narcotics charge prejudiced its decision on the bribery charge;

6. The Appellate Division did not have jurisdiction to reinstate the bribery conviction.

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* On February 19, 1975 petitioner Harrison pleaded guilty to manslaughter in the second degree in the Supreme Court, New York County. He is scheduled to be sentenced on March 20, 1975.

** The proper respondent in this case is not the People of the State of New York but John W. Ackerson, warden of the Bronx House of Detention, Bronx, New York, where petitioners are confined.

The District Court had before it the minutes of the trial and the subsequent suppression hearing (including transcripts and summaries of the tapes) and the briefs of both parties in the New York Court of Appeals. On December 18, 1973, in a thorough opinion, the District Court denied the application and ordered that no certificate of probable cause issue. As to petitioners' first claim, the Court found that the Appellate Division, in reinstating the bribery conviction, had applied the correct burden of proof in evaluating the taint. This is amply clear from the Appellate Division's opinion. *People* v. *Munger, supra,* 37 A D 2d at 950. The suggestion that the bribery convictions were inherently tainted by the prior illegal wiretaps was rejected since illegal conduct by the government which presents a defendant with an opportunity to commit bribery does not affect the validity of the bribery conviction.

As to the contention that a certain allegedly exculpatory tape was concealed from the defense at trial (claim 2), the Court found that the tape was not exonerating and thus that there was no prejudice to the defense. The erasure of certain tapes (claim 3) was held not to be prejudicial to the defense since summaries of the tapes were made available. Petitioners did not contest the accuracy or completeness of the summaries, and the summaries clearly showed that bribery was in no way mentioned in these tapes.

Petitioners' claims 4 and 5 were not considered by the Court since the Court held that they had not been exhausted in the state courts. Petitioners claimed that no hearing was ordered on the question of taint with respect to the bribery conviction because the Appellate Division reinstated the judgment without exploring the issue. This claim is apparently related to the next claim, which alleges that the jury, having heard the illegal evidence relating to the narcotics charge, must have been prejudiced on the bribery charge. Finally, the Court refused to consider the question of whether or not the Appellate Division had the

jurisdiction to reinstate the bribery conviction, since this is a question of state law only (claim 6).

Approximately eleven months later, petitioners applied to the Court of Appeals for a certificate of probable cause to appeal. In their application they raised only two contentions: 1) that the lower court had erred in finding claims 4 and 5 unexhausted, and 2) that the lower court erred in refusing to consider their claim regarding the jurisdiction of the Appellate Division. The application was denied without opinion on January 9, 1975. Petitioners now seek to review the Court of Appeals' order denying them a certificate of probable cause to appeal. They raise the same two contentions in this Court as were resented to the Court of Appeals.

Reasons for Denying the Petition for Certiorari

The Court of Appeals properly denied petitioners' application for a certificate of probable cause and no issue is presented for certiorari review.

The federal habeas corpus statute requires that a petitioner detained pursuant to state process obtain a certificate of probable cause before he can take an appeal in a habeas corpus proceeding. 28 U.S.C. § 2253. The federal courts have stated that the Congressional intent in enacting this provision was to impose strict limitations upon appeals in habeas corpus cases arising from state detention (*United States ex rel. Carey* v. *Keeper of Montgomery County Prison*, 202 F. 2d 267 [3d Cir. 1953]) and to eliminate frivolous appeals. *Ex Parte Farrell*, 189 F. 2d 540, 543 (1st Cir.), *cert. den. Farrell* v. *O'Brien*, 342 U.S. 839 (1951); *United States ex rel. Siegal* v. *Follette*, 290 F. Supp. 636, 637 (S.D.N.Y. 1968).*

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* Petitioners Munger and Hartley were the actual applicants for a certificate in the latter case.

Accordingly, the test for the issuance of a certificate is that the question presented be "substantial" (*Thomas* v. *Duffy*, 191 F. 2d 360, 362 [1951]; *Ex Parte Farrell, supra* at 543; *United States ex rel. Siegal* v. *Follette, supra* at 637) or "adequate to deserve encouragement to proceed further" (*United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 [2d Cir.], *cert. den.* 355 U.S. 846 [1957]) and that it not be "plainly frivolous" (*Poe* v. *Gladden*, 287 F. 2d 249, 251 [9th Cir. 1961]) or "devoid of merit" (*Burgess* v. *Warden, Maryland House of Correction*, 284 F. 2d 486, 488 [4th Cir. 1960], *cert. den.* 365 U.S. 837 [1961]). Moreover, it is well established that a district court's prior denial of an application for a certificate should be given "weighty consideration" by a Court of Appeals judge. E.g. *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967).

The issue of the New York Appellate Division's jurisdiction to reinstate petitioners' bribery convictions is purely a question of state law, as the District Court held.* It involves the allocation of jurisdiction by the State among its courts and does not constitute a claim that petitioners are "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). It is firmly established that questions of state law cannot be litigated in a federal habeas corpus proceeding. See, e.g., *Buchalter* v. *New York*, 319 U.S. 427 (1943); *United States ex rel. Sadowy* v. *Fay*, 284 F. 2d 246, 247 (2d Cir. 1960); *United States ex rel. Birch* v. *Fay*, 190 F. Supp. 105 (S.D.N.Y. 1961). Since an issue of state law obviously does not present a substantial question for review, the denial of a certificate of probable cause to appeal that issue was clearly correct. E.g. *United States ex rel. La Marca* v. *Denno*, 258 F. 2d 515 (2d Cir. 1958); *United States ex rel. Jones* v. *Richmond, supra; People of the State of New*

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* This is amply demonstrated by the petition, which relies solely on state statutes and cases in support of the claim. Petition at 13-18.

York ex rel. Epps v. *Nenna,* 214 F. Supp. 102, 105 (S.D.N. Y. 1963).

Petitioners also claim that the lower courts erred in finding two of their claims unexhausted, to wit, that they were denied a hearing on the question of taint regarding the bribery conviction and that the jury's hearing illegal evidence with respect to the narcotics charge prejudiced its decision in the bribery charge. Petitioners concededly had a suppression hearing on the issue of taint. They apparently now seek a hearing on whether or not the jury was prejudiced on the bribery charge because it heard the illegal evidence on the narcotics charge, even if the bribery conviction was not based on the illegal wiretaps.

Petitioners allege that these claims were considered by the New York Court of Appeals on their direct appeal. However, petitioners claimed only that "the denial of an evidentiary hearing on the possible use of illegal wiretaps" constituted error. *People* v. *Munger, supra,* 24 N Y 2d at 448. The Court of Appeals remanded for a hearing on this issue and a hearing was held. Petitioners, therefore, can only be asserting a claimed right to a further hearing. This claim has not been presented to the state courts.

The exhaustion requirement, 28 U.S.C. § 2254, mandates that the claim raised in the federal court be fairly presented to the state courts first. E.g. *Picard* v. *Connor,* 404 U.S. 270, 275 (1971). The federal claim must not only be raised in the state courts, but must have been based on the identical, specific grounds asserted in the federal court. *Id.* at 276-77; *United States ex rel. Gibbs* v. *Zelker,* 496 F. 2d 991 (2d Cir. 1974). Petitioners clearly have not met this requirement. Neither the hearing claim or the claim of prejudice by the jury could have been presented or decided on petitioners' direct appeal since these two claims are based on the subsequent reinstatement of the bribery conviction by the Appellate Division (Petition at 11-12).

Apparently realizing the futility of their argument that these claims were exhausted on their direct appeal, petitioners now allege that they raised these issues on appeal from the Appellate Division order reinstating the bribery convictions (Petition at 10). This contention is conspicuously absent from their Court of Appeals application for a certificate. In any event, petitioners admit that their appeal was dismissed by the Court of Appeals on procedural grounds (Petition at 7). Consequently, the New York courts have never been called upon to consider the claims. Petitioners have an available state remedy under N.Y. Crim. Proc. Law § 440.10.

A claim which has not been exhausted in the state courts clearly does not present a substantial question for appeal. E.g. *United States ex rel. Rogers* v. *Stanley*, 294 F. 2d 772 (2d Cir. 1961); *United States ex rel. Siegal* v. *Follette*, *supra* at 637; *Rines* v. *Commonwealth of Pennsylvania*, 285 F. Supp. 391, 393 (E.D. Pa. 1968); *United States ex rel. Cox* v. *Rundle*, 282 F. Supp. 115 (E.D. Pa. 1968). Accordingly, there was no error in the Court of Appeals' denial of a certificate of probable cause.

Moreover, petitioners' only argument to this Court is that the courts below committed error. This contention is insufficient to invoke this Court's certiorari jurisdiction. E.g. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923). Since petitioners have failed to present a substantial federal question or any other factor which would motivate the exercise of this Court's certiorari jurisdiction (Supreme Court Rules, Rule 19), their petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, March 20, 1975.

Respectfully submitted,

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